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No. 09-271

Supreme Court, U.S.
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In the Supreme Court of the United States

RICHMAN EM, *Petitioner,*
v.
CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

RESPONDENT'S OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentence of 50 years to life with the possibility of parole for a juvenile who aided and abetted a gang-related felony-murder, but who was not the shooter, constituted cruel and unusual punishment under the California Constitution and the Eighth Amendment.

2. Whether the evidence was insufficient to convict petitioner of first degree murder.

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STATEMENT OF FACTS AND PROCEDURAL BACKGROUND[1]

Shortly after midnight on May 11, 2006, while sitting in his parked police cruiser, Garden Grove Police Officer David Scroggins heard four shots fired nearby. He looked toward a self-service carwash across the street and saw a Toyota Corolla emerge from the carwash; he followed it and initiated a felony vehicle stop. Four persons were in the car: two Asian men -- petitioner and Narong Thongdeng; Joshua Richards; and Sharon Pech. A handgun was partially concealed below the driver's seat, and a blue-and-white bandana was on the backseat.

Another officer, Timothy Kovacs, was dispatched to the carwash, where he found Miguel Davila in the driver's seat of his car. Davila had been shot several times. Officer Kovacs asked him what had happened; Davila replied, "they shot me." When asked who had done this, Davila replied, "two Asian guys" wearing bandanas. Three bullet casings were found in Davila's car, and one was found outside the front passenger side door.

Davila died as a result of exsanguination from the four bullets that had penetrated him. Two of the bullets caused the fatal injuries.

Later that morning, police interviewed petitioner. He admitted he was "jumped into" the Exotic Family City Crips (EFCC) gang in January 2005. That gang had about 30 members, most of whom were Cambodian. Petitioner's moniker was "Lolo."

Petitioner told the officers he had met Thongdeng, whose moniker was "Joker," a few days before the shooting. He had met Richards, whose moniker was "Thug," the previous day. Thongdeng

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[1] The factual and procedural background is a synopsis taken from the Court of Appeal's opinion, published at *People v. Em*, 171 Cal. App. 4th 964, 967-70 (2009).

and Pech picked up petitioner in Wilmington and drove to Long Beach about 10:30 p.m. on May 10. They picked up Richards, drove to Garden Grove, and pulled into the carwash. Petitioner initially told the officers that he got out of the car to urinate, heard gunshots, and saw Thongdeng running back to the car. Petitioner further said that, after he hopped back in the car, Thongdeng tossed a gun to him and petitioner slid it under the driver's seat before the car was stopped by Officer Scroggins.

As the interview continued, petitioner changed his story. Ultimately, petitioner stated that, after he urinated, he went back to the car, where Thongdeng and Richards said, "they wanted to steal [Davila's] car and stuff." Richards had a gun in his pocket, and had given it to Thongdeng when they arrived at the carwash. Petitioner and Richards told Thongdeng "it's on" him if he wanted to do it. Petitioner stated, "I didn't know he was going to shoot him. I thought he was just going to take the car." Petitioner saw Thongdeng demand money and car keys from Davila, and then saw Thongdeng shoot Davila.

When petitioner, Thongdeng, and Richards got back in the car, Richards said to Thongdeng, "[m]an, I should have never gave it [the gun] to you. I knew you was going to pop him." When the police asked petitioner, "[w]hat'd you and [Richards] say when [Thongdeng] came up with the idea to rob this guy," petitioner responded, "we didn't say nothing. It was like . . . we just said it's on you. . . . [¶] . . . [¶] We didn't say nothing. We just said it', on you if you want to do it and he said, yeah, I'm a . . . he's just like, 'Well, give it to me. I'm gonna do it.' He just came up to him and did it."

At trial, a gang expert testified about the dynamics of the EFCC gang and that petitioner, Thongdeng, and Richards were active members of the gang. The expert further explained that the dark clothing petitioner was wearing at the time of Mr. Davila's shooting would assist a gang member in committing crimes at night without being seen, and would make it more difficult to identify him later.

A jury in Orange County convicted petitioner of first degree murder (Cal. Penal Code § 187(a)) and active participation in a criminal street gang (Cal. Penal Code § 186.22(a)). The jury further found petitioner guilty for the vicarious discharge of a firearm by a gang member, causing death (Cal. Penal Code § 12022.53(d) & (e)(1)), and that the murder had been committed for the benefit of, at the direction of, or in association with a criminal street gang (Cal. Penal Code § 186.22(b)).

The court sentenced petitioner to a total of 50 years to life. The sentence consisted of an indeterminate term of 25 years to life for the murder with a consecutive indeterminate term of 25 years to life for the firearm enhancement.

On appeal, petitioner urged that the evidence was insufficient for the jury to convict him of first degree murder. He further contended that the consecutive sentences amounting to an indeterminate term of 50 years to life *with* the possibility of parole constituted cruel and unusual punishment under both the California Constitution and the Eighth Amendment.

The California Court of Appeal rejected all of Petitioner's claims. *People v. Em*, 171 Cal. App. 4th at 969-77. The California Supreme Court denied review. In the present petition for Certiorari, petitioner raises the same contentions he raised in the Court of Appeal and in the California Supreme Court.

REASONS FOR DENYING THE WRIT

This Court should deny the writ as to both questions.

As to the sufficiency of evidence claim, petitioner does not to suggest that the Court of Appeal's conclusion as to the sufficiency of evidence raises an important issue of law that should or needs to be resolved by this Court. To the contrary, the Court of Appeal applied the well-established and correct legal standard in properly reviewing the

record. Petitioner asks this Court merely to re-apply the standard and to reweigh the evidence.

As to the cruel and unusual punishment claim, petitioner's request for this Court to review the Court of Appeal's decision under the California Constitution is inappropriate. This Court does not grant certiorari to review questions of state law. Instead, the California courts are the final arbiters of questions that arise under the state constitution. Here, the Court of Appeal properly applied controlling California Supreme Court precedent in analyzing Petitioner's claim under the state constitution.

To the extent Petitioner asserts that his punishment violated his Eighth Amendment rights, this Court should deny the writ because petitioner forfeited this claim under state procedural law. Further, the state court correctly determined that petitioner's punishment—an indeterminate term allowing for the possibility of parole—is not unconstitutional. Nor will this case likely be controlled by decisions in the pending *Graham*[2] and *Sullivan*[3] cases, which involve non-murder sentences without any possibility of parole.

A. This Court Should Not Grant Certiorari to Review the Fact-Bound Question of Whether the State Court Reached the Correct Result in Applying the Well-Established and Proper Standard for Assessing the Sufficiency of the Evidence

Petitioner asserts that this Court should grant the Writ because the evidence failed to establish that he aided and abetted the murder. He urges that the evidence simply showed his presence at the crime

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[2] *Graham v. Florida* (No. 08-7412)
[3] *Sullivan v. Florida* (No. 08-7621)

scene rather than any degree of active participation. (Petition at 5.) In raising this claim, petitioner fails to acknowledge that the Court of Appeal applied the substantial evidence standard of review articulated by this Court. He further glosses over the evidence establishing his active participation in the robbery that resulted in Davila's death.

"The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252, 2274, 173 L.Ed.2d 1208 (2009) (Scalia, J., dissenting). Petitioner fails to demonstrate how this Court's exercise of certiorari jurisdiction to review whether substantial evidence supported his conviction would clarify the law. Moreover, under this Court's Rule 10, which explains the general criteria for the exercise of this Court's certiorari jurisdiction, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The Court of Appeal properly applied the standard of review articulated by this Court in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979): "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Original italics.) The Court of Appeal reviewed the "entire record in the light most favorable to the judgment" for "evidence that [was] reasonable, credible, and of solid value such that a reasonable trier of fact could [have found] the defendant guilty beyond a reasonable doubt." *People v. Em*, 171 Cal. App. 4th at 970.

Applying this well-settled standard, the Court of Appeal explained that the record disclosed substantial evidence supporting the jury's conclusion that petitioner shared Thongdeng's intent to commit the robbery, that he aided and abetted and was an integral part of the robbery, that he did so for the benefit of his gang, and that he was therefore liable for the murder under a felony-murder theory. *People*

v. Em, 171 Cal. App. 4th at 970-71. The Court of Appeal reasonably and properly applied this Court's controlling precedent to the facts of this case in concluding that substantial evidence supported the judgment. Nothing in the Court of Appeal's conclusion warrants this Court's exercise of certiorari jurisdiction because there is nothing that raises an ambiguity as to the law.

B. Whether Petitioner's Sentence of 50 Years to Life Violated the California Constitution is not a Basis for Granting the Writ.

The bulk of petitioner's claim, that his punishment was unconstitutional, is asserted under the Article I, section 17, of the California Constitution, which provides that "cruel or unusual punishment may not be inflicted or excessive fines imposed." (Petition at 6-7.) To the extent Petitioner claims his punishment was unconstitutional under the California Constitution, the claim raises only a state-law question and is therefore not a proper subject for certiorari review by this Court. The California state courts are the final arbiters of what the cruel or unusual punishment clause of the California Constitution means. "'It is fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions.'" *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000), quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920 (1940). Thus, this Court should not grant the writ to review the Court of Appeal's application of the cruel or unusual punishment clause of the California Constitution.

C. Petitioner's Sentence of 50 Years to Life with the Possibility of Parole is Constitutional

Petitioner cursorily asserts that his punishment of 50 years to life with the possibility of parole

violates the proscription against cruel and unusual punishment under the Eighth Amendment. (Petition at 8-9.) Although this federal claim could be considered by this Court, this Court should deny the writ for three reasons.

First, petitioner is procedurally barred from raising the claim because he forfeited it when he failed to object on this ground in the trial court. Second, the Court of Appeal correctly applied this Court's Eighth Amendment jurisprudence when it concluded that Petitioner's sentence was constitutional. Third, this case is materially different from the *Graham* and *Sullivan* cases pending in this Court because, despite being a juvenile, petitioner was sentenced for his complicity in a murder to a an indeterminate life term that provides for the possibility of parole. Because this case differs from the *Graham* and *Sullivan* cases, this Court need not hold the Petition pending resolution of those cases.

1. Petitioner Forfeited the Claim By Failing to Object to the Sentence in the Trial Court

Petitioner is procedurally barred from challenging the constitutionality of his sentence. As the Court of Appeal noted, he forfeited the claim "by failing to raise it in the trial court in the first instance." *People v. Em*, 171 Cal. App. 4th at 971, n. 5. The Court of Appeal's state-law procedural-bar ruling provides an independent ground supporting the judgment so that any ruling by this Court on the Eighth Amendment question would be advisory only and would not change the judgment. Under such circumstances, the Writ must be denied. *Michigan v Long*, 463 U.S. 1032, 1040-1041 (1983).

Petitioner may counter that his procedural default is immaterial in light of the fact that the Court of Appeal addressed the merits of his constitutional claim. However, as that court explained, it opted to address the merits of

Petitioner's claim "in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim." *People v. Em*, 171 Cal. App. 4th at 971, n.5. The Court of Appeal's decision to address the merits in the alternative, however, does not deprive the separate state-law procedural-default ruling of its preclusive or restrictive effect on federal-court jurisdiction. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Therefore, in light of the state-law procedural ground supporting the judgment, this Court should deny the Writ.

2. The Court of Appeal Reasonably Applied this Court's Eighth Amendment Jurisprudence in Concluding that Petitioner's Sentence was Constitutional

This Court should deny the Writ because the Court of Appeal reasonably applied this Court's established Eighth Amendment jurisprudence and did not erect a conflict of law with any of the federal circuits that should be resolved by this Court. *See* Supreme Court Rule 10. The length of prison sentences for felonies is primarily a matter for the States and for the legislative branch of government to determine. *Lockyer v. Andrade*, 538 U.S. 63, 70-74, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 998-99, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (recognizing the primacy of the legislature in affixing punishments for criminal conduct) (Kennedy, J. concurring).

Outside the context of the death penalty, the "Eighth Amendment . . . contains a 'narrow proportionality principle.'" *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. at 996-97). Under this narrow proportionality principle, the Eighth Amendment "does not require strict proportionality between crime and sentence." *Ewing v. California*, 538 U.S. at 23. "Rather, it forbids only

extreme sentences that are 'grossly disproportionate' to the crime." *Id.*

This Court has never invalidated a prison sentence as cruel and unusual on account of its length where the sentence allowed for parole. *See Rummel v. Estelle*, 445 U.S. 263, 274, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980) ("for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative"). Indeed, successful Eighth Amendment challenges to prison sentences are, as this Court has noted, "exceedingly rare" and require an "extreme" case. *Lockyer v. Andrade*, 538 U.S. at 73; *Rummel v. Estelle*, 445 U.S., at 272.

Here, the Court of Appeal applied the foregoing principles and noted that if, under this Court's decisions in *Lockyer* and *Ewing*, recidivist punishments of 25 years to life and 50 years to life for petty theft did not constitute cruel and unusual punishment, then Petitioner's 50 years to life for "the crime of murder, with a gang enhancement for the vicarious discharge of a firearm resulting in death," could not constitute cruel and unusual punishment. *People v. Em*, 171 Cal. App. 4th at 977. In light of this Court's Eighth Amendment decisions, Petitioner's punishment, which allows for parole, is not cruel and unusual.

3. Although Petitioner is a Juvenile, this Case is Materially Different from the *Graham* and *Sullivan* Cases Pending in this Court

Nor is there any reason to grant certiorari or hold this case in light of the pending *Graham* and *Sullivan* cases. In *Graham*, the 16-year old defendant was placed on probation for armed burglary with assault or battery, a first-degree felony punishable by life in prison, and for attempted armed robbery, a second-degree felony. *Graham v. State*, 982 So.2d 43, 45 (2008). After serving a one-year jail term, the defendant violated probation by committing

two armed home-invasion robberies and confessing to the commission of several more. The court sentenced the then 19-year old to life in prison *without* the possibility of parole. *Id.* In *Sullivan*, the recidivist defendant was 13 years old in 1989 when he raped a woman in her home. He was sentenced to life in prison *without* the possibility of parole. (Petition for Writ of Certiorari, *Sullivan v. Florida* (08-7621), at 5-6.)

There are significant differences between the instant case and the pending *Graham* and *Sullivan* cases. First, unlike the defendants in *Graham* and *Sullivan*, who were convicted of non-homicides, petitioner was convicted of the most serious class of offenses—that of first degree murder. Second, unlike the defendants in *Graham* and *Sullivan*, petitioner is still eligible for parole.

Petitioner may counter that, although he was convicted of first degree murder, he was not as culpable as his accomplice because he was not the shooter. This assertion, on its own, demonstrates the impropriety of granting the writ because this Court would then need to make individualized factual determinations as to petitioner's culpability.[4] Such individualized considerations have historically been reserved for determining whether capital punishment is appropriate and not whether an indeterminate sentence with the possibility of parole is appropriate. *See Harmelin v. Michigan*, 501 U.S. at 996 ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.") Additionally, that petitioner was not the shooter is immaterial in light of this Court's pronouncement that *capital* punishment is constitutional when imposed upon an accomplice who actively participates in the

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[4] This further underscores the procedural default. Petitioner did not object in the trial court and therefore never developed the record with any evidence as to his individual culpability.

commission of a dangerous felony and who does so with reckless disregard for human life. *Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S. Ct. 1676; 95 L. Ed. 2d 127 (1987).

Moreover, granting the writ would require this Court to step into the quagmire of making proportionality determinations as to the propriety of imposing indeterminate terms for juvenile murder accomplices—determinations that are best left to the state legislatures. *Rummel v. Estelle*, 445 U.S. at 274. Additionally, this Court would have to decide on the propriety of consecutive enhancing sentencing schemes and whether the imposition of an indeterminate term for the use of a firearm consecutive to an indeterminate term for murder when imposed upon a juvenile violates the constitution. However, whether a punishment is grossly disproportionate to the crime will only be found in the rare or exceptional case. *Lockyer v. Andrade*, 538 U.S. at 73. This Court has invalidated only two federal or state sentencing statutes for being grossly disproportionate. In *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910), this Court invalidated a sentence of fifteen years in chains and at hard labor, plus permanent surveillance and civil disabilities, for the crime of falsifying a public document. Seventy-three years later, in *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), this Court invalidated a sentence of life imprisonment *without* the possibility of parole imposed under South Dakota law against a nonviolent recidivist whose final crime was uttering a check with the intent to defraud.

By stark contrast, petitioner was sentenced to an indeterminate life term with the possibility of parole for a crime far more serious than falsifying public documents or uttering bad checks. There is nothing inherently disproportionate, let alone grossly disproportionate, as to the punishment petitioner received for his crime. Indeed, this Court has upheld a 40-year sentence for possession and distribution of 9 ounces of marijuana. *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982), and a life

sentence, *without* the possibility of parole, for possession of more than 650 grams of cocaine. *Harmelin*, 501 U.S. at 1005.

In any event, the Court of Appeal, here, engaged in a thorough proportionality review, in which it analyzed individualized considerations, under the state constitution. The Court of Appeal considered the seriousness of petitioner's offense in aiding and abetting the felony murder, his integral role in assisting Thongdeng in carrying out the gang robbery, his culpability in light of his knowledge Thongdeng was armed, his age, his prior criminal record and how he was on probation with gang conditions at the time of the instant crime. *People v. Em*, 171 Cal.App.4th at 972-76. While the court acknowledged that age matters, it further recognized that murder also matters. *Id.* at 976. Thus, the court concluded, based on all the individualized factors at play, that petitioner's punishment was proportionate with his crime. *Id.* Notably, in analyzing petitioner's claim under the California Constitution, the Court of Appeal engaged in an individualized analysis that is more exacting than required under the Eighth Amendment, which only compels such analysis for capital cases. See *Harmelin v. Michigan*, 501 U.S. at 996.

Although parole is available to petitioner, he might argue that, because parole is not possible for 50 years, he is serving the functional equivalent of a life term without the possibility of parole. However, unlike in *Graham* and *Sullivan* where parole is not available at all, the length of time before Petitioner is eligible for parole is a function of consecutive sentencing Petitioner received two consecutive 25 years to life terms because he aided and abetted a robbery which resulted in death (felony-murder) *and* because he aided and abetted a fellow armed gang member (vicarious firearm enhancement) in that robbery. If petitioner had committed or aided and abetted an unarmed robbery resulting in the death of the victim, he would be eligible for parole in 25 years. That the legislature opted to punish the use of a firearm by a gang member in the commission of a

crime with a consecutive term of 25 years to life should not be second-guessed by this Court. *Harmelin v. Michigan*, 501 U.S. at 998-99 (Kennedy, J. concurring); *Rummel v. Estelle*, 445 U.S. at 274.

California's gang firearm enhancement imposed upon petitioner is akin to a the federal firearm enhancement under 18 U.S.C. § 924(c) which imposes mandatory additional punishment when a firearm is used in the commission of a drug or other violent felony. The Circuit Courts of Appeals have uniformly concluded that application of this enhancing federal sentencing provision passes constitutional muster even when imposition thereof could result in a term of years that could exceed the reasonable life expectancy of a defendant. *See United States v. Walker*, 473 F.3d 71, 79-84, fn. 6 (7th Cir. 2007) (providing a comprehensive overview of Circuit Courts of Appeals rejecting an Eighth Amendment challenge to the mandatory sentencing provisions of 18 U.S.C. § 924(c)); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004) (a lengthy sentence under 18 U.S.C. § 924(c), "even if it might turn out to be more than the reasonable life expectancy of the defendant" is not cruel and unusual punishment). That petitioner was punished with two consecutive indeterminate terms of 25 years to life because of the substantive felony murder and his aiding and abetting an armed gang member in the commission of the robbery, which resulted in death, is no different – it passes constitutional muster. Although the mandatory consecutive sentencing provisions at play in this case might be harsh, much like the provisions of 18 U.S.C. § 924(c), they are certainly not unusual in the constitutional sense. *Harmelin v. Michigan*, 501 U.S. at 994 ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense").

That petitioner was three months shy of 16 years old is of no significant moment. Unlike this Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1, 13 (2005), in which this Court struck down application of *capital punishment* for juveniles, this case involves a

juvenile who is serving a life sentence and will become eligible for parole. That eligibility, albeit in 50 years, and the fact that petitioner stands convicted for murder, places this case in an entirely different light from the *Graham* and *Sullivan* cases, in which parole for non-homicide offenses was not available. As this Court noted in *Harmelin*, Petitioner still enjoys the hope of possible "flexible techniques" for sentence reduction, in addition to "retroactive legislative reduction and executive clemency." *Harmelin v. Michigan*, 501 U.S. at 996.

In sum, petitioner's case contrasts sharply with the *Graham* and *Sullivan* cases. Petitioner is eligible for parole even though the jury convicted him for complicity in a first degree murder and found that he willingly and intentionally aided an armed fellow gang member in the robbery which resulted in the killing of the victim. This is materially different from the defendants in *Graham* and *Sullivan* who committed non-homicidal crimes and were punished with life imprisonment *without* the possibility of parole. This Court need not hold this case pending resolution of *Graham* and *Sullivan* because of the material differences between those cases and the instant matter.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Dated: December 23, 2009
Respectfully submitted

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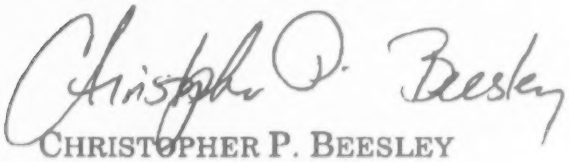

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